QUAN KIM HOCK

v.

TIMBALAN MENTERI DALAM NEGERI & ORS

HIGH COURT MALAYA, KUALA LUMPUR
NIK HASHIM J
[CRIMINAL APPLICATION NO: 44-38-99]
3 NOVEMBER 1993

CRIMINAL PROCEDURE: *Habeas corpus - Detention of drug addict - Recommendation of rehabilitation officer - Whether conclusive - Whether mandatory for magistrate to comply with recommendation - Order made by magistrate different from that recommended - Whether unlawful - Drug Dependants (Treatment and Rehabilitation) Act 1983, s. 6(1)*

CRIMINAL PROCEDURE: *Habeas corpus - Detention of drug addict - Certificate as to drug dependency - Contents of - Whether doctor signing certificate must indicate that he is a government medical officer or a registered medical practitioner - Whether failure to do so renders certificate invalid - Whether drug through the use of which applicant became a drug dependant must be named - Whether certificate may contain further statement other than that required in Form 2 Drug Dependants (Treatment and Rehabilitation) (Forms) Rules 1998 - Whether certificate necessary for order under s. 6(1) Drug Dependants (Treatment and Rehabilitation) Act 1983*

CRIMINAL PROCEDURE: *Habeas corpus - Detention of drug addict - Conditions necessary - What must be present for magistrate to make an order - Drug Dependants (Treatment and Rehabilitation) Act 1983, s. 6(1)*

CRIMINAL PROCEDURE: *Habeas corpus - Detention of drug addict - Opportunity to make representations - Whether failure of magistrate to give applicant such opportunity fatal - Drug Dependants (Treatment and Rehabilitation) Act 1983, s. 6(1)*

ADMINISTRATIVE LAW: *Remedies - Habeas corpus - Grounds for application - Whether court may go beyond pleaded grounds - Whether court duty bound to examine record of inquiry to ensure order made according to law*

The applicant was held to be a drug dependant and was ordered by a magistrate to be admitted to a rehabilitation centre pursuant to s. 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ('the Act'). This was the applicant's application for a writ of *habeas corpus* to be released forthwith.

One of the grounds relied upon by the applicant was that the doctor certifying the applicant to be a drug dependant failed to name the drug or drugs the applicant was supposed to be dependent on. The court detected that the certificate certifying the applicant to be a drug dependant did not indicate clearly whether the doctor who signed the same was doing so in his capacity as a government medical officer or a registered medical practitioner. Further, notwithstanding that he did not indicate the drug or drugs the applicant was supposed to be dependent on, the doctor had made two notations in the said certificate stating "Urine Morfin - Positive" and "Impression: Drug Addict".

Another ground raised by the applicant was that he was not given an opportunity to make representations contrary to s. 6(1) of the Act. The inquiry note stated "subject hadir - tiada aduan".

The court also detected that the magistrate made an order under s. 6(1)(a) of the Act contrary to the recommendation of the rehabilitation officer that the applicant undergo supervision under s. 6(1)(b) of the Act.

Held:

[1] The magistrate's order on a drug dependant under s. 6(1)(a) or (b) of the Act cannot be lawfully made unless (i) the person to be ordered to undergo treatment (s. 6(1)(a) of the Act) or supervision (s. 6(1)(b) of the Act) is certified by a government medical officer or a registered medical practitioner to be a drug dependant; (ii) the magistrate must act on the recommendation of a rehabilitation officer; and (iii) an opportunity to make representations must be given to the person before the magistrate makes the order.

[2] The certificate as to drug dependency must be in the form of Form 2 as specified in the schedule to the Drug Defendants (Treatment and Rehabilitation) (Forms) Rules 1998. Form 2 is self-explanatory. There must be positive proof that the certificate was signed by a government medical officer or a registered medical practitioner. The dangerous drug or drugs through the use of which the person became a drug dependant must be stated in the space provided for in Form 2. If it is not determinable what type of drug he is dependent on, then the relevant sentence must be deleted accordingly. Without a medical certificate, an order under s. 6 of the Act may not be made. Thus, it is crucial that the medical certificate must be valid in law. It must be self-sufficient, free from any defects, certain in terms, and above all, it must not contain any further statement other than that required in Form 2 which might appear to be doubtful and contradictory with the contents of the certificate.

[2a] The doctor signing the certificate could not be a government medical officer and a registered medical practitioner at the same time. Therefore, he should have deleted the provision which was not applicable to him. Without the deletion to indicate that he was a government medical officer and the failure of the official stamp to clarify his capacity, the medical certificate could not be accepted as a valid medical certificate for the purpose of s. 6(1) of the Act.

[2b] The notation "Urine Morfin - Positive" contradicts the certificate which did not indicate that the applicant was dependent on any particular drug. Furthermore, the notation "Impression: Drug Addict" makes the certificate doubtful whether the applicant was really a drug dependant. If the doctor had actually certified in the certificate that the applicant was a drug dependant, then there is absolutely no necessity for the doctor, unless he was doubtful, to further state his impression by including notations. The notations were confusing rather than helpful. As such, the medical certificate was defective and its defects, although technical in nature, were substantial and indeed fatal to the validity of the magistrate's order.

[3] It is now mandatory and thus obligatory on the part of the magistrate to comply with the recommendation of the rehabilitation officer in making an order either under s. 6(1)(a) or (b) of the Act. The magistrate has no longer any choice but to give effect to the rehabilitation officer's recommendation. Since the magistrate's order under s. 6(1)(a) of the Act was contrary to the rehabilitation officer's recommendation, it was therefore unlawful for not being in compliance with the law.

[4] The failure to give effect to the rehabilitation officer's recommendation and the fact that the medical certificate was not certified either by a government medical officer or a registered medical practitioner were not pleaded as the grounds for application. However, the court is duty bound in an application for *habeas corpus* - where a liberty of a person is involved - to go beyond the stated grounds and examine the record of inquiry in order to satisfy itself that the order made by the magistrate under the Act is in accordance with the law. Where the order cannot be held to be in accordance with the law, the order is bad and the person ordered to undergo treatment at a rehabilitation centre or supervision by an officer is entitled to be released forthwith.

[5] There was no indication in the inquiry note whatsoever that the applicant was given an opportunity to make representations. "Tiada aduan" means that the applicant had no complaint to make. But 'aduan' is not 'representation'. Thus, by failing to give the applicant an opportunity

to make representations, the learned magistrate was in breach of s. 6(1) of the Act and hence his order could not be held to be valid.

[Application allowed; applicant ordered to be released forthwith.]

Case(s) referred to:

Kamaruzaman Yahaya v. Menteri Hal Ehwal Dalam Negeri, Malaysia [1997] 5 CLJ 290 ***(refd)***

Sanuar Kamaruddin Ahmad v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor [1996] 5 MLJ 1 ***(refd)***

Legislation referred to:

Drug Dependants (Treatment and Rehabilitation) Act 1983, s. 6(1)(a), (b), (2), (3)

For the applicant - Richard Bong; M/s Bong & Co
For the respondents - Mohd Abazafree Mohd Abas; FC

Reported by S Dharmendran

JUDGMENT

Nik Hashim J:

The Application

The applicant, a 38-year old man earning RM7,500 per month as proprietor of a kejuruteraan besi, was arrested on 9 August 1999, and on 8 September 1999 was ordered to undergo treatment at the Pusat Pemulihan Serenti Gambang, Pahang for two years and thereafter to undergo supervision of a rehabilitation officer for another two years under s. 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 (the Act) as amended by the Drug Dependants (Treatment and Rehabilitation) (Amendment) Act 1998 (the Act A1018) which came into force on 1 September 1998 *vide* P.U.(B) 329 dated 27 August 1998. The applicant made an application for a writ of *habeas corpus* on the following grounds contending that the learned magistrate had failed to:

(a) hold an inquiry in the presence of his counsel;

(b) ensure the types of dangerous drugs mentioned in the medical certificate;

(c) fix a date for inquiry and to call witnesses to give evidence; and

(d) give the applicant an opportunity to make representations.

It is to be noted at the outset that the respondents have not filed any affidavits in reply. The learned Federal Counsel for the respondents merely relied on the record of inquiry as the basis for his argument against the application.

Section 6

As adverted to earlier, the Act was amended by the Act A1018. The magistrate's order which may be made on a drug dependant is now governed by the new s. 6 of the Act which states:

(1) Where a person who has undergone the tests referred to in section 3 or 4 and, in consequence of such tests, is certified by a government medical officer or a registered medical practitioner to be a drug dependant, the officer shall produce him, or cause him to appear before a Magistrate, and the Magistrate shall upon the recommendation of a Rehabilitation Officer and after giving such person an opportunity to make representations –

(a) order such person to undergo treatment at a Rehabilitation Centre specified in the order for a period of two years and thereafter to undergo supervision by an officer at the place specified in the order for a period of two years; or

(b) order such person to undergo supervision by an officer at the place specified in the order for a period of not less than two and not more than three years.

(2) An order of supervision imposed on a person under paragraphs (a) and (b) of subsection (1) shall contain the following conditions:

(a) the person must reside in a State or Federal Territory or any area as specified in the order;

(b) the person must not leave the area where he resides without the written permission of the Director General;

(c) at the time specified in the order, the person shall report at the nearest police station or for a member of the armed forces at the place specified by an officer;

(d) the person shall not consume, use or possess any dangerous drugs;

(e) the person shall undergo such tests at such time and place as may be ordered by an officer; and

(f) the person shall undergo any programme for the rehabilitation of drug dependants held by the Government.

(3) any person undergoing supervision under paragraph (a) or (b) of subsection (1) who fails to comply with any condition imposed under subsection (2) shall be guilty of an offence and shall on conviction be liable to be punished with imprisonment for a period not exceeding three years or to whipping not exceeding three strokes or to both.

The Conditions Precedent Under S. 6

Though s. 6 was amended, its character remained unchanged by the amendment. Its provision is still penal in nature, affecting the freedom of an individual. As such, its provision must be construed strictly. What is clear from the above provision is that, the magistrate's order on a drug dependant under s. 6(1)(a) or (b) cannot be lawfully made unless the following conditions precedent are strictly complied with:

(1) The person to be ordered to undergo treatment (s. 6(1)(a)) or supervision (s. 6(1)(b)) is certified by a government medical officer or a registered medical practitioner to be a drug dependant;

(2) The magistrate must act on the recommendation of a rehabilitation officer; and

(3) An opportunity to make representations must be given to the person before the magistrate makes the order.

Thus, under the new provision, the conditions precedent under the pre-amended s. 6 of the Act as listed in *Sanuar Kamaruddin Ahmad v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1996] 5 MLJ 1, are now reduced accordingly.

Apart from the condition precedent (2), the other two conditions precedent (1) and (3) are not new.

The Importance Of A Valid Medical Certificate

The need for a valid medical certificate is obvious. The certificate to drug dependency must be in the form of Form 2 as specified in the Schedule to the Drug Dependants (Treatment and Rehabilitation) (Forms) Rules 1998 (the Rules).

Form 2 provides:

FORM 2

DRUG DEPENDANTS (TREATMENT AND REHABILITATION) ACT 1983

(Subsection 6(1))
CERTIFICATE AS TO DRUG DEPENDENCY

To:

The Magistrate,
Magistrate's Court,
...

I, ... a * government medical officer/registered medical practitioner, having carried out the necessary tests upon ... Identity Card No. ... aged ... years of ... certify that he * is/is not a drug dependant within the meaning of the Act. ** The dangerous drug/drugs through the use of which he became a drug dependant *is/are ...

Dated ...

...
* Medical Officer/Registered Medical Practitioner
(Official Stamp)

c.c:

Rehabilitation Office ...

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* Delete whichever is not applicable.

** Delete if the person is not a drug dependant or if it is not determinable what type of drug he is dependent upon.

From the above, it is clear that Form 2 is self-explanatory. There must be positive proof that the certificate was so signed by a government medical officer or a registered medical practitioner (see *Kamaruzaman Yahaya v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1997] 5 CLJ 290; [1997] 5 MLJ 256). Besides, the dangerous drug or drugs through the use of which the person became a drug dependant must be stated in the space provided for in Form 2. If it is not determinable what type of drug he is dependent upon, then the relevant sentence must be deleted accordingly.

In the present case, Borang 2 (Form 2) was stated in the following manner:

BORANG 2

AKTA PENAGIH DADAH (RAWATAN DAN PEMULIHAN) 1983

(Subseksyen 6(1))

PERAKUAN TENTANG PENAGIHAN DADAH

Kepada:
Majistret,
Mahkamah Majistret,
TEMERLOH.

Saya, Dr. Tharvinder Singh s/o Sadhu Singh, seorang *pegawai perubatan kerajaan/pengamal perubatan berdaftar, setelah menjalankan ujian-ujian yang perlu ke atas QUAN KIM HOCK, K/P No. 610503-10-5823 berumur 38 tahun yang beralamat di No. 68, Taman Dahlia, Temerloh, Pahang Darul Makmur

memperakui dia *ialah/~~bukan~~ seorang penagih dadah mengikut pengertian Akta. **Dadah/dadah..dadah berbahaya yang digunakan yang menyebabkan dia menjadi seorang penagih dadah ialah ...

Bertarikh: 25hb. Ogos 1999

Catitan:
Urine Morfin - Positive
Impression: Drug Addict

t.t.
...
*Pegawai Perubatan/Pengamal Perubatan Berdaftar
PEGAWAI PERUBATAN
HOSPITAL MENTAKAB.

s.k.

Pegawai Pemulihan ...

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* Potong mana yang tidak berkenaan.

** Potong jika orang itu bukannya seorang penagih dadah atau jika tidak dapat ditentukan apakah jenis dadah yang diketagihi olehnya.

The Effect Of Non-compliance With Form 2

In my view, the certificate in the Borang 2 above was defective and invalid, and therefore, the learned magistrate could not rely upon it to make the order as he did for two reasons. Firstly, the doctor who signed the certificate did not indicate clearly in it whether he was certifying it in his capacity as a government medical officer or a registered medical practitioner. He could not be both at the same time. Therefore, he should delete the provision which was not applicable to him. In the instant case, he failed to delete the words that were not attributed to him. Without the deletion to indicate that he was a government medical officer and without the word "Kerajaan" after the words "Pegawai Perubatan" in the official stamp, the medical certificate on the applicant so signed by the doctor in the Borang 2 above could not therefore be accepted as a valid medical certificate for the purpose of s. 6(1) of the Act.

Secondly, the doctor failed to name the drug or drugs, through the use of which the applicant became a drug dependant. This was one of the grounds relied upon by the applicant in his application for *habeas corpus*.

On these two matters, the learned Federal Counsel for the respondents argued that the defects in the medical certificate were only in form and submitted that the certificate was still valid in substance. With respect, I did not agree with him. The medical certificate is very important. Without it, an order under s. 6 would not be possible. Thus, it is crucially important that the medical certificate must be valid in law, and in order to be one, it must be self-sufficient, free from any defects, certain in its terms, and above all, it must not contain any further statement other than required in form 2 or borang 2 which might appear to be doubtful and contradictory with the contents of the certificate. Take for example in this case. The certifying doctor had put "–" to indicate that the applicant was not dependent upon any particular dangerous drug, yet under the "Catitan" he had stated: "Urine Morfin – Positive". This statement "Urine Morfin – Positive" appears to be contradictory to "–" in the certificate that the applicant was not dependent upon any dangerous drug. Furthermore, the words "Impression Drug Addict" under "Catitan" makes the certificate doubtful whether the applicant was really a drug dependant. If indeed the doctor had actually certified in the certificate that the applicant was a drug dependant then, to my mind, there is absolutely no necessity anymore for the doctor, unless he was doubtful, to further state his impression on the applicant under the catitan. The "catitan" was confusing rather than helpful. As such, I found the medical certificate defective and its defects though technical in nature, were substantial and indeed fatal to the validity of the learned magistrate's order.

Grounds (a) And (c)

With regard to grounds (a) and (c) of the application, I held that they were of no merit. The proceeding before the magistrate on 8 September 1999 was in fact an inquiry fixed and conducted for the purpose of s. 6 of the Act. Therefore, the applicant had no cause for complaints on those grounds. (See note of inquiry at A2 p. 3).

Mandatory For Magistrate To Comply With Rehabilitation Officer's Recommendation

The condition precedent (2) as listed above is new under s. 6 of the Act. By its provision, it is now mandatory and thus obligatory on the part of the learned magistrate to comply with the recommendation of the Rehabilitation Officer (the RO) in making the order either under s. 6(1)(a) or (b) of the Act. Under the section, the learned magistrate has no longer any choice but to give effect to the RO's recommendation. I find support for the above view from the explanatory statement for the amendment of s. 6 in the Drug Dependants (Treatment and Rehabilitation) (Amendment) Bill 1997 which reads:

4. Clause 4 seeks to amend section 6 so that if a Rehabilitation Officer recommends that a person should be ordered to reside at a Rehabilitation Centre or to undergo supervision by an officer, the Magistrate before whom the person is produced or appears **must** make such order.

(Emphasis added)

In this case, the RO in his report at "A.5" had recommended:

> Adalah disyorkan supaya subject diletakkan di bawah pengawasan seorang pegawai menurut seksyen 6(1)(b) Akta Penagih Dadah (Rawatan dan Pemulihan) (Pindaan) 1998, di Daerah Temerloh Negeri Pahang selama 2 tahun.

The learned magistrate, contrary to the recommendation, made the order under s. 6(1)(a) of the Act instead. (see borang 3 and notes of magistrate's inquiry at A2 p. 3.). This order was indeed against the very words "Dan bahawasanya atas syor Pegawai Pemulihan ..." which appeared in the magistrate's order in borang 3. Since, the magistrate's order under s. 6(1)(a) was contrary to the R.O.'s recommendation which was under s. 6(1)(b), it was therefore unlawful for not being in compliance with the law.

The Court To Go Beyond The Grounds To Ensure Validity Of Order

Though the ground for failing to give effect to the R.O.'s recommendation and the other pertaining to the medical certificate which was not certified either by a government medical officer or a registered medical practitioner were not pleaded as the grounds for the application, this court nevertheless, in its view, is duty bound in an application for *habeas corpus*, where a liberty of a person is involved, to go beyond the stated grounds and examine the record of inquiry in order to satisfy itself that the order made by the magistrate under the Act is in accordance with the law. Where the order cannot be held to be in accordance with the law, the order is bad and the person ordered to undergo treatment at a rehabilitation centre or supervision by an officer is entitled to be released forthwith.

The Opportunity To Make Representations

Finally, learned counsel for the applicant complained that the applicant was not given an opportunity to make representations in this case. To my mind, the complaint was justified.

Making representations means the right to protest *ie*, the right to challenge whatever is being brought against him. In the present case, there was no indication in the inquiry note whatsoever that the applicant was given an

opportunity to make representations. What was stated in the note was "subject hadir – tiada aduan." "Tiada aduan" means that the applicant had no complaint to make. But 'aduan' is not 'representation'. Thus, by failing to give the applicant an opportunity to make representations, the learned magistrate was in breach of the statutory provision and hence, his order could not held to be valid.

Conclusion

For the above reasons, I allowed the application and ordered that the applicant be released forthwith.